HIGH COURT OF UTTARAKHAND AT NAINITAL

(Court's order whether the case is or not approved for reporting)

Description of case

First Appeal No. 29/04.

Fariyad Hussain

Vs.

Subhas Chandra & ors.

Approved for reporting

~~**Not Approved for reporting**~~

Date of Decision: 10.05.2007

Initial of Judge:

HIGH COURT OF UTTARAKHAND AT NAINITAL

F.A. NO. 29 OF 2004

Fariyad Hussain,
S/o Haji Ishtiak Hussain,
R/o Moh. Chhipian, Jaspur,
Tehsil Jaspur, District-Udham Singh Nagar.

.....Appellant-Plaintiff.

Vs.

1. Subhash Chandra,
2. Prabhash Chandra,
   sons of Sri Anand Priya,
3. Arvind Kumar,
4. Avinash Kumar,
5. Atul Kapoor,
   S/o Sri Satya Priya,
   All R/o Mohalla Bhup Singh.
   Jaspur, Tehsil – Jaspur,
   District-Udham Singh Nagar. ...Respondent-Defendants.

Dated: 10.5.2007

Hon'ble Rajesh Tandon, J.

Heard Sri Jagdish Prasad, counsel for the appellant and Sri V.K. Bisht, Sr. Advocate, assisted by Ms. Sangeeta Miyan, counsel for the respondents.

2. By the present first appeal filed under Section 96 of the Code of Civil Procedure, the plaintif-appellant has prayed for setting aside the judgment and order dated 22.4.2004 passed by Addl. District Judge II, (Fast Track Court), Udham Singh Nagar in Civil Suit No. 5 of 2002 ***Fariyad Hussan Vs. Subhash Chandra and others*** dismissing the suit of the plaintiff-appellant for declaration in respect of plot no. 341 min

area 0.036 hectare of village Amratpur Tehsil Kashipur-Jaspur, District Udham Singh Nagar.

3. Briefly stated, a suit was filed by the plaintiff for a declaration that he has acquired the ownership of Gata No. 341 area 0.036 hectare by way of adverse possession.

4. The civil Court has framed as many as two issues to the following effect:

1- Whether the adverse possession of the plaintiff over the disputed land has become matured?
2- To what relief the plaintiff is entitled?"

5. Issue No. 1 was decided by holding that the plaintiff has failed to prove that he has been in adverse possession. However, his possession is like a tenant of the premises.

6. Issue No. 2 thereafter was decided by holding that the plaintiff is not entitled for any relief since the plaintiff-appellant is already in possession.

Discussion on Point Nos. 1 and 2.

7. According to the plaint averments, the plaintiff is in possession since 1970-71 Fasli and earlier to plaintiff, his father Sri Ishtiyaq Hussain was occupying the land and therefore, he has claimed that after his death, he has acquired the rights of ownership by adverse possession.

8. In paragraph 5 of the plaint, it has been stated that a notice was sent by the defendant on 28th July, 2001 demanding the rent of Rs.70/- per month and it has been stated in the notice that the rent for the period of49 months have become

due and he has constructed a Stall (Farh) and is doing the business of Carpenter.

9. in paragraph 6 of the plaint, it has been stated that the plaintiff is not recorded in the revenue records and hence, the suit was filed for declaration claiming his ownership.

10. A written statement was filed by the defendants, who are the sons of the original owner namely Sri Anand Priya. In the written statement, it has been stated that the plaintiff is continuing as as tenant of the land Gata No. 341 and earlier to him his father was the tenant and as such in view of the relationship of lessor and lessee, the plea of adverse possession taken by the plaintiff was denied by the defendant.

11. in the additional pleas, the defendant has stated in paragraph 11 and 12 that the predecessor of the plaintiff has taken the land from the father of the defendants and therefore, he is the tenant of the premises in dispute. Relevant paragraphs 11 and 12 of the additional pleas are quoted below:-

> “10- ;g fd oknh dk dkbZ okn dkj.k fo:) ifroknhx.k iwnk ugh gSvkA rFkk nkok oknh [kkfjt fd;s tkus ;kX; gSA 11& ;g fd xke ve`riqj tlipqj rglhy dk’khiqj ds [kljk u0 341 feu o vkl ikl ds dbZ uEcjku ds Hkfe/kj ifroknx.k ds efjl pys vkrs Fks okn dk ifroknhx.k gqvk ftl Hkfe ij ifroknhx.k ls fHkUu&fHkUu 0;fDr;ksa us vkjkth fdjk;s ij yxdj muij e[;r;k ydMh dk 0;kikj ‘kq: fd;k vkj dbZ 0;fDr;ksa dk ifroknhx.k Hkfe cp Hkh pqdh gSA dbZ ij vkt Hkh fdjk;s nkjkuu vkckn gSa ftuesa ls ,d oknh Hkh gSA oknh dk dFku xyr gS fd og vo/k dCtnkj gksus ls vc ekfyd gks pqdk gSA

12&;g fd okn h dk firk Lo) Jh bf’r;kd g l u }kjk ge’kk viu dk vkjkth dk fdjk;nkj ekuk Hkh x;k g vkj mUgkus viu thoudky e ifroknhx.k d efjl Jh vkuUnfi; o lR;fi; dk o ifroknhx.k dk fdjk;k Hkh vnk fd;k gA bl idkj okn h ;k rk utkudkjh d dkj.k ;k fQj cnfu;rh l tkuc>dj >B cky jgk gA vkj nkok e; gj tk [kpk o fo’k”k g tk ifroknhx.k fujLr gkus ;kX; gA”

12. The trial Court after considering the entire evidence on record has dismissed the suit and has recorded the finding that there was a relationship of lessor and lessee and therefore, the plaintiff cannot be allowed to claim adverse possession on account of having been in possession as alleged by him.

13. A perusal of the record shows that P.W.1 Fariyad Hussain in paragraph 1 of his affidavit has stated that Gata No. 341 area 0.036 hectare has been in the name of Sri Anand Priya and Satya Priya, who were recorded as original tenure holders and thereafter the defendants have been recorded as heirs of Anand Priya and Satya Priya.

14. Plaintiff in paragraph 2 of the plaint has stated that in year, 1971, his father has put in possession. Further it has been stated that he has received the notice demanding the arrears of rent. Relevant paragraph 1 and 2 showing that the predecessor of the defendants was the original tenure holder are quoted below:

“1 & ;g fd xkVk l[;k 341 jdcb 0&036 g0 Hkfe fLFkr ekt k ve r ij rglhy dk’khij d ey [kkrnkj lo Jh vkuUn fi; vkj lR;fi; FkA vkuUn fi; dh eR; gb vkj mudh eR; mijkUr l Hkk”k pUn vkj iHkk”kpUn crkj okfjl nt g,s vkj lR; fi; dh eR; ij

mudk i=x.k vjfoUn dqekj] vfouk’k dqekj vkj vrqy dqekj ntl gq,A

2& ;g fd mijkDr Hkkfe ij ‘kiFkdrk dk firk gkth bf’r;kd gqlus dkfct Fk vkj 0k”k 1970 & 71 l bl Hkkfe ij gkth bf’r;kd gqlus dk dCtk Fkk vkj ;g Hkkfe crkj ydMh iMko ntl FkhA bUr[kkc [kljk 1381 Qlyh yxk;r 1392 Qlyh dh iekf.kr ifrfyfi i’k dh gSA

5& ;g fd ifroknh us fnukd 28&7&2001 dk ,d ukfVl ‘kiFkdrk dk bl vk’k; dk fn;k fd ‘kiFkdrk bl QM dk 70&00 :Ik;s ekgokj dk fdjk;snkj gS vkj 49 ekg dk fjdlk;k ‘kiFkdrk l ryc fd;k ifroknhx.k dk eyy ukfVl fnukd 28&7&2001 dkxt l[;k 12x in’k &6 gSA

15. In paragraph 11 of the affidavit, rent receipts have also been admitted.

16. Similar affidavit has been filed by Sri Mubarak Hussan, who has also admitted that the original tenure holder was late Mr. Satya Priya i.e. the predecessor of the defendants. Relevant paragraph 2 of the said affidavit is quoted below:-

;g fd ‘kiFkdrk lo Jh vkuUn fi; ,o lR; fi; i=x.k Lo0 yky fo’kHkj lju fuoklh tcipj rglhy dk’khipj ftyk m/keflg uxj rFkk gkth b’r;kd gqlus dk Hkyh Hkkfr tkurk gSA

17. Nothing has come in the cross-examination in order to disprove the title of the predecessor of the defendants.

18. On behalf of the defendants, Subhash Chandra, son of Anand Priya was examined, who has deposed that the plaintiff continues to be the tenant of Anand Priya. Relevant portion of the affidavit is quoted below:-

eSa bl ekeys esa ,d izfroknh gS ekeys ls tkudkjh j[krk gS eSa fookn xLr vkjkth ij okniz gekjk fdjk;snkj pyk vkrk gSA bl lEc/a k budh firkth b’R;kd gSlu fdjk;snkj Fks ftudk bUrdky 1996 esa gks x;k vkj okniz fdjk;snkj gSvk vkj fdjk;snkj dh gSfl;r ls fookn xLr vkjkth ij dkfct gSA

19. Similar affidavit has been filed by another son namely Sri Atul Kumar. Relevant portion of the affidavit is quoted below:

eSa bl ekeys esa ,d izfroknh u0 5 gS vkj oknxLr vkjkth dk nhik izfroknh x.k ds lkFk lg [kkrsnkj gSA oknh Qfj;kn gSlu okn xLr vkcdjh ij gekjs fdjk;snkj dh gSfl;r ls dkfct gSA oknh mudh firk us ejh tkudkjh esa gekjs firk dh lR;fi;a o rkÅ Jh vkuUn fi;a vkfn dks fdjk;k Hkh vnk fd;k gSA

20. Subhash Chandra-defendant has also proved the rent receipts, which have been paid by the father of the plaintiff to the following effect:

;g dguk xyr gS fd ;g nkuks jlhnsa ejs }kjk uk cukbZ xbZ gSA vkj ;g Hkh xyr gS oknh ds fuirk ds gLrk{kj u gSA ;g Hkh xyr gS fd jlhnsa gekjs }kjk QthZ cukbZ x;h gSa vkj QthZ gLrk{kj cuk, xls gSA ;g dguk Hkh xyr gS oknh gekjs fdjk;snkj u gks vkj viu vf/kdkj ls dkfct gS 15 :Ik;s eghus ds fdjk;s nkj Fks dkfct 48 efgus dk fdjk;k Fkk 720 :Ik;k fdjk;s dk FkhA e>s bl le; ;kn ugha gS fd eSus b’R;kd gSlu ds firk dk D;k uke fy[kk Fkk&oknxLr vkjkth ds ijc esa ulhe gSA mRrj esa /;ku ugha gSA if’pe esa Hkh /;ku ughaA vkt dgks nf{k.k esa jkLrk gSA

21. The rent receipts have also been filed as Paper No. 26-Ga Dated 31st December, 1987 and 6th May, 1995.

22. From a perusal of the record, it appears that there was no material to hold that the plaintiff has acquired the ownership rights by adverse possession.

23. Counsel for the appellant has referred the judgment of ***Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (Dead) by LRs & heirs etc. AIR 1995 SC 895.*** Relevant paragraphs 12 and 13 are quoted below:-

> "12. Article 65 of the Schedule to the Limitation act, 1963 prescribes that for possession of immovable property or any interest therein based on title, the limitation of 12 years begins to run form the date of the defendant's interest becomes adverse to the plaintiff. Adverse possession means a hostile assertion i.e. possession which is expressly or impliedly in denial of title of the true owner. Under Article 65, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must how by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed.
>
> 13. Where possession could be referred to a lawful title, it will not be considered to be adverse. The reason being that a

person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another title. One who holds possession on behalf of another does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."

24. As will appear from the observations of the Apex Court that the plaintiff was required to establish his title on adverse possession by acquiring unequivocal evidence i.e. possession was hostile to the real owner. In the present case, the defendant has proved that plaintiff occupied the plot by virtue of the permission granted by the owner namely Satya Priya as will appear from his own admission. As such, it cannot be presumed that the possession of the plaintiff was hostile to the defendant at any point of time and as such the observations of the Apex Court are distinguishable in the present case.

25. In ***Deva (Dead) through LRs. Vs. Sajjan Kumar (Dead) by LRs 200 (7)SCC 481,*** the apex Court has observed that mere long possession will not prove the adverse possession and it has been held that mere long possession for more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to the latter's knowledge cannot result in acquisition of title by the defendant. Relevant paragraphs are quoted below:

"11. The deposition extracted above, in any case, negatives the defendant's case of having prescribed title by adverse possession from the year 1940. The animus to hold the land adversely to the title of the true owner can be said to have

stated only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment—on the plaintiff's survey number.

12. The abovequoted admission contained in the defendant's deposition, does not make out a case in his favour of having acquired title by adverse possession. Mere long possession of the defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to the latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land.

13. The plaintiff's suit is not merely based on his prior possession and subsequent dispossession but also on the basis of his title to Survey No. 452. The limitation for such a suit is governed by Article 65 of the Limitation act of 1963. The plaintiff's title over the encoroached land could not get extinguished unless the defendant had prescribed title by remaining in adverse possession for a continuous period of 12 years."

26. In view of the foresaid, I find no merit in the appeal and the appeal is dismissed with costs.

(Rajesh Tandon, J.)

10.05.2007
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